QUESTION PRESENTED

Whether the governors of the states have a right under the Constitution to prevent units of the United States National Guard from being sent overseas for the purpose of training?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 89-542

RUDY PERPICH, as Governor of
The State of Minnesota,
and
THE STATE OF MINNESOTA,
by its Attorney General
Hubert H. Humphrey, III,
Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION, SENATORS STEVEN D. SYMMS AND JESSE HELMS, AND CONGRESSMEN ROBERT K. DORNAN, HERBERT H. BATEMAN, C. CHRISTOPHER COX, PHILIP M. CRANE, WILLIAM E. DANNEMEYER, TOM DeLAY, BILL FRENZEL, ELTON GALLEGLY, JOHN PAUL HAMMERSCHMIDT, DUNCAN HUNTER, HENRY J. HYDE, ROBERT J. LAGOMARSINO, NORMAN F. LENT, BOB LIVINGSTON, BILL McCOLLUM, HOWARD C. NIELSON, MICHAEL G. OXLEY, RON PACKARD, H. JAMES SAXTON, NORMAN D. SHUMWAY, DENNY SMITH AND BOB STUMP IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. WLF engages in litigation and administrative proceedings affecting the broad public interest, and has particular expertise in the area of national security and defense. In that regard, WLF has participated as a party, counsel, or *amicus* in a number of national security cases, and has represented over 200 Members of Congress in many of them. *See, e.g., Goldwater v. Carter*, 444 U.S. 996 (1979); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1984); *Palestine Information Office v. Shultz*, 647 F. Supp. 910 (D.D.C. 1987), *aff'd*, No. 87-5398 (D.C. Cir. Aug. 5, 1988). Furthermore, WLF filed a brief in the U.S. Court of Appeals for the Second Circuit in *Dukakis v. U.S. Dept. of Defense*, 686 F. Supp. 30 (D. Mass. 1988), 859 F.2d 1066 (1st Cir. 1988) (*per curiam*), *cert. denied*, 109 S.Ct. 1743 (1989).

Senator Steven D. Symms, *et al.*, desire to participate in this case in order to protect their legislative interests under the Constitution. Furthermore, many of the Senators and Congressmen voted in favor of the "Montgomery Amendment" which is the subject of this lawsuit. They object to Petitioners' position in this case because if that position prevails, then governors could seriously undermine our national security by vetoing military training decisions made by the President and the Secretary of Defense with respect to the federal

component of the National Guard, *i.e.*, the United States National Guard.

In accord with Supreme Court Rule 37.1, *amici* has presented arguments that will not be presented by other parties. Furthermore, the views of the Senators and Congressmen contained in the brief provide a unique perspective in this case.

WLF and Senator Symms, *et al.* submit this brief in support of Respondents with the written consent of both parties.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt the Statement of the Case as set forth in Respondents' brief.

SUMMARY OF THE ARGUMENT

The issue in this case is whether the Constitution gives state governors the power to block federal training of the United States National Guard, a reserve component of the United States Army, whenever they disagree with the purpose, type, location, or schedule of such training. *Amici* contend that the answer is no.

Governor Perpich and the state of Minnesota claim that the Militia Training Clause of the Constitution--which reserves the training of "militia" to the states under the discipline prescribed by Congress--allows the Governor of Minnesota to keep units of the Minnesota National Guard from being sent overseas on a training mission if the governor objects to the mission. Petitioners claim that the statute that denies the governors such authority, 10 U.S.C. § 672(f) (the Montgomery

Amendment), is unconstitutional. However, Petitioners fail to acknowledge that the state's authority to train the National Guard is limited in that it must be in accordance to the "discipline prescribed by Congress." Furthermore, the National Guard has a dual status--it is not only a state "militia"; it is also an integral, functioning part of the U.S. Army. When the Guard is ordered into federal service, Congress is exercising its constitutionally assigned power "to raise and support armies." This power was understood by the Framers as well as by this Court to be paramount over a state's training authority over its militia, which can never be used to restrict the military and foreign policies of the federal government.

The argument that the Constitution imposes a gubernatorial consent requirement on the training of a component of the U.S. Army is an utterly insupportable attempt to apply the otherwise laudable concept of "states' rights" to the one area in which it is least appropriate: military affairs. The Petitioners' argument in this case is little more than a veiled attempt to usurp the power of the federal government to conduct foreign policy.

ARGUMENT

I. Introduction.

The issue in this case is whether the Constitution assigns state governors a virtual veto power over the federal government's military objectives in the training of the National Guard. *Amici* contend that the answer is no.

Governor Perpich and the State of Minnesota filed suit in an effort to keep units of the Minnesota National

Guard from being sent to Honduras on a training mission. Specifically, they sought a declaration that the Montgomery Amendment, 10 U.S.C. § 672(f), violates the Militia Training Clause of the United States Constitution (art. I, § 8, cl. 16)[1] insofar as that Amendment restricts the authority of a state governor to withhold consent to training, outside the United States, of members of a state National Guard. The Militia Training Clause authorizes Congress: "To provide for organizing, arming and disciplining the Militia and for governing such part of them as may be in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress." Minnesota so argues even though it admits, as it must, that every member of a state National Guard is also a member of the United States National Guard.[2]

Although Petitioners frame the issue as if familiar principles of statutory and constitutional interpretation mandate reversal of the court below, Petitioners are actually asking this Court to overturn long established precedent that makes it clear that the Congress has responsibilities for the training of the National Guard.

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[1]The Militia Clause actually consists of clauses 15 and 16 in Article 1, Section 8. The two are commonly referred together in case law and literature as the Militia Clause. Clause 16, standing alone, is commonly referred to as the Militia Training Clause.

[2]"The National Guard is a component of the organized militia of the United States. 10 U.S.C. § 101. It is a unique military force in that each unit within the Guard is responsible to two governments, one local . . ., and the other federal, *i.e.*, that of the United States." *Penagaricano v. Llenz*, 747 F.2d 55, 56 (1st Cir. 1984). Thus, members of a state National Guard "concurrently hold membership in a distinct federal military organization." *Id.*

Amici respectfully submit that this Court should reject the Petitioners' claims on the grounds that the Montgomery Amendment is a valid assertion of Congressional power under both the Militia Clause (art. I, § 8, cl. 15, 16) and the Army Clause of the Constitution (art. I, § 8, cl. 12), as well as for the reason that the Militia Training Clause gives the governor's authority over the National Guard only when it is operating in its state--as opposed to its federal--status. In short, that clause was never intended to transform state governors into 50 would-be Secretaries of Defense with the power to control our nation's military readiness.

II. The Judiciary Owes the Greatest Possible Deference to Congressional Judgments Concerning National Defense and Military Affairs.

Before discussing the specific basis for the Petitioners' claims, it must be noted that a court is called upon to perform its "gravest and most delicate duty" when, as here, it is asked to review the constitutionality of an Act of Congress. *Blodgett v. Holden*, 276 U.S. 142, 148 (1927) (Holmes, J.). Inasmuch as Congress is "a coequal branch of government whose members take the same oath as [judges] do to uphold the Constitution," courts must accord "'great weight to the decisions of Congress.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) [quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973)]. This "customary deference" is even more appropriate in the instant case, since Congress "specifically considered the question" of the

Montgomery Amendment's constitutionality prior to enacting it. *Rostker v. Goldberg, id.*[1]

However, this is a case deserving more than just the usual deference accorded federal statutes. Rather, "it arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference." *Rostker v. Goldberg, id.* at 64-65. The Supreme Court "has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies" [*id.* at 65, quoting *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)], and has characterized Congress' power "to raise and support armies and to make all laws necessary to that end" as "broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

A great degree of judicial deference to Congress' authority under the Army Clause is further warranted by the fact that "the lack of competence on the part of the courts" in national defense and military affairs "is marked." *Rostker v. Goldberg, supra*, 453 U.S. at 65. Indeed,

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military

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[1] *See, e.g.*, 132 Cong. Rec. H6265 (statements of Reps. Stratton and McKernan), H6267 (statement of Rep. Montgomery) (daily ed. Aug. 14, 1986). *See also Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services*, 99th Cong., 2nd Sess. (1986) at pp. 3-6, 10-11. (Statement of James H. Webb, Assistant Secretary, Reserve Affairs).

> force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphasis in original). Thus, while Congress is not "free to disregard the Constitution when it acts in the area of military affairs[,] . . . the tests and limitations may differ because of the military context. . . . [T]he Constitution itself requires such deference to Congressional choice." *Rostker, supra*, 453 U.S. at 67. In light of the above, the court in *Dukakis v. Department of Defense*, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub. nom., Massachusetts v. United States Department of Defense*, 109 S.Ct. 1743 (1989), was entirely right when, addressing this very issue, it stated that:

> "In general, disputes are to be resolved through political process (rather than in the courts) where in essence they are disputes as to whether particular calls of units of the militia to temporary active duty, and the location to which such units are sent during such a period, do or do not serve national interests. Absent proof that a body to whom the responsibility and power for deciding such disputes has exceeded constitutional bounds in some way, courts cannot property intrude." *Id.* at 38.

See also Schlesinger v. Ballard, supra, 419 U.S. at 510 ("This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' . . . The responsibility for determining how best our armed forces shall attend to that business rests with Congress, see U.S. Const. Art. I, § 8, cls. 12-14, and with the President. See U.S. Const. Art. II, § 2, cl. 1") [quoting [*U.S. ex rel.*] *Toth v. Quarles*, 350 U.S. 11, 17 (1955) and citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)].

Thus, in assessing the constitutionality of the Montgomery Amendment, this Court must give special deference not only to Congress' judgment that the Amendment was constitutional, but also to Congress' and the President's--as opposed to Governor Perpich's--judgment that our nation's military needs warranted a National Guard training mission in Honduras.

III. The Montgomery Amendment is a Proper Exercise of Congressional Power Under the Militia Clause of the Constitution.

The Militia Clause of the United States Constitution is a careful balancing between the needs of the states and the requirements of the Federal Government. An examination of the debates at the Constitutional Convention and of the ratification debates makes it clear that the Montgomery Amendment is consistent with the original intent of the framers of the Constitution with respect to the balance between state and federal control of the militia.

Governor Perpich and the state of Minnesota argue that the Militia Training Clause gives each of the 50 governors the Constitutional right to prevent the National Guard from the governor's respective state from being sent overseas for training. That argument relies on that portion of the Militia Training Clause which reserves to the states the appointment of the officers and the authority of training. A closer reading of the Militia Clause shows the error in that idea. Clause 16 of Section 8 of Article 1 of the Constitution authorizes Congress to:

> To provide for organizing, arming, and disciplining the Militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training, the Militia *according to the discipline prescribed by Congress*. (Emphasis added).

The Petitioners virtually ignore the language of Clause 16, which modifies the states authority to train the militia. That language limits the states authority to train in that the training must be according to the "discipline" prescribed by Congress. That modifying language gives the Congress the authority to direct the states as to how and where to train the National Guard.

The Petitioners claim that "'[d]iscipline,' as used in the context of the Militia Training Clause, means uniform training exercises and was intended to ensure that states trained the militia according to the same standards." (Pet. Brief 9). The Petitioners argue that "discipline" is limited to a system of drill such as in tactics or drill regulations.

To support Petitioners' interpretation of the intent of the founders, they rely on upon a law review article from 1940 and Congressional reports from 1902 and 1917. However, those sources do *not* support Petitioners' contention.

The law review article cited by Petitioners states that in the early militia acts "discipline" meant a system of drill. Weiner, *The Military Clause of the Constitution*, 54 Harv. L. Rev. 181, 214-215 (1940). However, when the author discusses the meaning of "discipline", he is discussing whether the word "discipline" gives

Congress the authority to regulate courts martial for the state militia. The author is not engaged in a discussion of whether the meaning of the word "discipline" in the 1790s encompassed other forms of training, beyond the manual of arms, such as field maneuvers. The author concludes that, despite the fact that the early militia acts used "discipline" to mean drill, the word had a more expansive meaning and Congress has the power to regulate courts martial as part of its authority to prescribe "discipline." Furthermore, the article concludes that was the understanding of the Founders. Hence, the bottom line is that the author interprets the word "discipline" to mean *more* than merely drill.

The Congressional Report, S. Doc. No. 695, 64 Cong. 2d Sess. 35 (1917) ("The Militia") is also cited by the Petitioners to support their interpretation of the Framers' meaning of the word "discipline." It is a compendium of excerpts from the framers, but expresses *no* view as to the meaning of the word "discipline." Those excerpts support *amici*'s understanding of the meaning (*see* discussion *infra* at 12-15). There is nothing in that Congressional Report to indicate that the meaning of "discipline" does not go beyond merely the manual of arms.

Finally, H.R. Rep. No. 1094, 57th Cong., 1st Sess. 19 (1902) is the last authority relied upon by the Petitioners to support the argument that the meaning of "discipline" is limited to the manual of arms. However, that report clearly shows that the authors of that report believed that the word "discipline" extended beyond merely the manual of arms. That report recommends that under the authority of the "discipline prescribed by Congress" that the Congress should allocate funds "to be used for the training of the organized militia in camp duty and field service." The report goes on "to

authorize the participation of the organized militia in the encampments and maneuvers of the Regular Army." The report also calls upon the Secretary of War to make annual estimates of the cost, so that "the authority of Congress to regulate the matter is assured". The report goes to call for "a certain amount of drill and a certain amount of instruction" of the militia. The report lead to the passage of the Dick Act of Jan. 21, 1903, 32 Stat. 775, which was a significant milestone on the road to the modern National Guard (see discussion, *infra*, at 22). There is nothing in the report which limits Congressional authority to the "manual of arms" or "drill" when prescribing "discipline." Rather it supports the proposition that "discipline" includes a wide variety of training.

What were the views of the Framers and the members of the early Congresses about the roles of the states and Congress in the training of the militia?

The Militia Clause is cast in terms of a grant of power to Congress. The term "militia" must be distinguished from the "armies" to be raised and supported by Congress and the "troops" forbidden to be kept by the states in peacetime. What the framers meant by the "militia" was

> a home-defense force, composed of most able-bodied men. This force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint. Even before 1776 had run its course, Washington was warning Congress that 'To place any dependence upon Militia, is, assuredly, resting upon a broken staff.'. . . [M]ilitia came to mean undisciplined and badly regulated forces. Belief in citizen-soldiers became inextricably intertwined with an

> undying faith in the martial prowess of untrained men led by political generals. Wiener, *supra*, at 182-3.

Precisely because of the sorry state of the militia, the Framers--in clause 16 of Section 8 or Article I--authorized Congress

> to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

In addition, Congress was authorized "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions" (clause 15).

The narrow appointment/training exception to clause 16's otherwise broad grant of authority to Congress was the subject of some debate at the Constitutional Convention in 1787.[4] Some supporters of the appointment/training exception were motivated by a concern that the uniformity that would result from federal training would render a particular state's militia less adaptable to local conditions.[5] Others feared that the federal government

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[4] *See* Farrand, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press), vol. II, at 329 *et seq.* and 385 *et seq.*

[5] *See, e.g.*, Farrand, *supra*, at 386 ("Mr. Dayton was against so absolute a uniformity. In some states there ought to be a greater proportion of cavalry than in others. In some places rifles would be most proper, in others muskets. . .").

would neglect the militia.[6] Still others, according to Alexander Hamilton, believed the provision would have the salutary effect of insuring that officers would be men "who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests." *The Federalist Papers*, (Mentor, 1961), No. 29 (at 186). Such men would be sure to resist any attempt by the federal government to use them "for the purpose of riveting the chains of slavery upon a part of their countrymen. . . ." *Id.*

With the Militia Training Clause, the Framers acknowledged a role for the states in the training of the militia, but at the same time circumscribed the states' power by limiting such training to that done in accord with the "discipline provided by Congress."

The debates at the Convention concerning the Militia Training Clause make it clear that the "discipline" prescribed by Congress had the potential to limit the state's leeway in training the militia.

One delegate, Mr. Elsworth, expressed his view that ". . . The term discipline was of so vast an extent and might be so expanded as to include all power on the subject." Farrand, *supra*, at 385.

Another delegate, Mr. Gerry, stated that

> This power in the U-S as explained is making the States *drill-sergeants*. He had as lief let

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[6]*See, e.g., id.* at 387 ("Mr. Luther Martin was confident that the States would never give up the power over the militia: and that, if they were (do so), the militia would be less attended to by the Genl. than by the State Governments").

> the Citizens of Massachusetts be disarmed, as to take the command from the states *and subject them to the General Legislature*. It would be regarded as a system of Despotism. *Id.* at 385 (Emphasis added.)

In summary, while the drafters of the Constitution desired to reserve some role to the states, they recognized that the training role would be severely restricted by the Congressional power to prescribe the "discipline" of such training.

The Second Congress indicated a view far different from that propounded by the Petitioners. While military concepts and technology have evolved over time, the drill regulations that the Framers were familiar with took recognition of the fact that drill includes more than merely the manual of arms. Congress, in the Militia Act of 1792 laid out specific and detailed instructions to the states as to how they were to organize the militia, including the instructions as to when the militia were exempt from carrying knapsacks while in training! *Militia Act of 1792*, ch. 33, 1 Stat. 271 (1792). Such instructions are a more extreme form of the "micromanagement" of training by the Congress than merely directing where the National Guard will train.

In the 15th Session of Congress, in 1818, a congressional report stated that "a system of "discipline, comprehending the camp duties, instruction, field exercise, and field service of militia." H.R. Rep. No. 160, 15th Cong., 1st Sess. 675 (1818). That early Congress recognized that "discipline" encompasses much more than merely the manual of arms.

Obviously, the military requirements of 200 years have changed dramatically. However, just as the 15th

Congress recognized it had authority over field exercises, so also Congress today has authority to control the choice of the location of field exercises.

No longer are the militia if mobilized likely to fight in their own states defending their own territory. Instead it is likely that if the National Guard goes into combat it will be in a climate far different from that of Minnesota. In the last twenty years United States Armed Forces have primarily fought in tropical climates--Vietnam, the Dominican Republic, Grenada, Libya and most recently in Panama. The need to train troops in various climates is established military doctrine. As the Court below pointed out, the National Guard now comprise a significant part of the total United States Military forces, including forty-six percent of the combat units and twenty-eight percent of the support forces. *Perpich v. Department of Defense*, 880 F.2d 11, 15 (8th Cir. 1989). It would be military folly to exclude such a large part of our forces from training in foreign climates. That would endanger not only the security of the United States but also those Guardsmen who might be thrust into a combat situation in a tropical clime for which they are untrained and unprepared.

Even Petitioner implicitly adopts the view that the training of the Guard in various climates is required. In their brief, Petitioners quote approvingly the National Guard Bureau that

> [N]o governor has said he opposes overseas deployment training--all have said they wholeheartedly believe in it and understand and support the need for it. (Pet. brief. at 45).

More than the intent of the founders and military doctrine support the view that the Militia Clause grants

the Congress extensive powers with respect to the training of the National Guard. Past precedents of this Court also support that view. The Governor and state of Minnesota conveniently ignore the case of *Gilligan v. Morgan*, 413 U.S. 1 (1973), which made clear that the Congress has an important role in the training of the National Guard.

In that case, this Court made it clear that the states power to train the militia was *according to the "discipline" prescribed by Congress*. (emphasis in the original) *Id.* at 6. This court went on to hold that "the training, weaponry and orders of the Guard . . . embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government" *Id.* at 7. *Gilligan* is entirely consistent with the historical meaning of the Militia Clause and the requirements of the Army in the twentieth century.

In summary, the Militia Training Clause does not give the governors a veto power over training missions of the National Guard. The state's powers under the Militia Training Clause are limited in that the training must be in accord with the "discipline prescribed by Congress." At the time of the Constitutional Convention, it was understood that the word "discipline" encompassed more than merely the manual of arms. Early Congresses made it clear that the field exercises were included within the area of the Congressional power to prescribe the "discipline" of the militia's training.

Just as the Militia Clause was a careful balancing act that attempted to balance the interests of the states against the interests of the Federal Government, so also the Montgomery Amendment follows in that tradition as careful balance between the interests of the states and

the national security interests of the entire nation. The Montgomery Amendment permits the state governors to withhold troops from training exercises if they are needed for a domestic emergency within the state.

Hence, this Court can and should sustain the constitutionality of the Montgomery Amendment on the basis that it is a lawful exercise of Congressional power under the Militia Clause pursuant to the Congressional power to prescribe the "discipline" under which training can occur. Sustaining the Montgomery Amendment will serve the requirements of the Department of Defense in time of war yet preserve and retain the important state functions under that clause.

IV. The Army Clause Also Gives the Congress the Authority to Restrict the State Governors from Exercising a Veto Power Over the Training of the National Guard.

The Army Clause (Article 1, Section 8, clause 12), which gives Congress the power "to raise and support armies," is logically placed among the clauses that give Congress the power "to declare war," "to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces" (clauses 11, 13, and 14, respectively). The Army Clause also gives the Congress authority to prevent the state governors from exercising a veto power over the training of the National Guard. The only limitation contained in the Army Clause is that "no appropriation of money [to raise and support armies] shall be for a longer term than two years." This limitation reflects the

Framers' concerns about standing armies.[7] It was thought that requiring Congress to reconsider its funding of troops biennially would be a wholesome check on an army that might otherwise grow ever larger, more costly, and more powerful.[8]

As Alexander Hamilton noted, however, apart from this limitation, Congress' power under the Army Clause and its surrounding clauses was

> to exist without limitation, *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The Federalist Papers, supra* No. 23 (at 153--Hamilton) (emphasis in original)

Once it is decided that "there ought to be a federal government intrusted with the care of the common defense . . . it will follow that that government ought to be clothed with all the powers requisite to complete execution of its trust." *Id.* at 153-4. Indeed, "there can be no limitation of that authority which is to provide for the defense . . . in any matter essential to the *formation, direction*, or *support* of the NATIONAL

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[7]"The people in this country cannot forget their apprehensions from a British standing army, quartered in America. . . ." *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People* (1787-1788) (P.L. Ford, ed.). "Examination by Noah Webster," at 51.

[8]*See, e.g., The Federalist Papers, supra*, Nos. 24 (at 185: two-year limitation was "a precaution," "a great and real security against military establishments without evident necessity"--Hamilton) and 41 (at 259: "the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support"--Madison).

FORCES." *Id.* at 154 (emphasis and capitalization in original). Such a limitation would be "both unwise and dangerous." *Id.* at 156. It was in order to enable Congress to implement these powers that the framers assigned Congress the additional power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."[9] U.S. Const. art. I, § 8, cl. 18.

To ensure that the states would not infringe upon the federal government's plenary authority in the military and foreign policy sphere, the framers included in Article I a "No State shall" section, *i.e.*, section 10, clause 1 of which states, in pertinent part, that "No state shall enter into any treaty, alliance, or confederation [or] grant letters of marque and reprisal," and clause 3 of which specifically forbids a state to "keep troops or ships of war in time of peace, enter into any agreement or compact with any other State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit delay."

In considering the merits of vesting authority over national defense in the federal government as opposed to the states, Hamilton posed the following questions:

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[9]Furthermore, these laws, in conjunction with and when made pursuant to the Constitution, were to be "the supreme law of the land[,] . . . anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const., Art. VI, § 2.

See also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional").

> Is there not a manifest inconsistency in devolving upon the federal government the care of the general defense and leaving in the state governments the *effective* powers by which it is to be provided for? . . . Have we not had unequivocal experience of its effects in the course of the revolution which we have just achieved?[10]

The Constitutional provisions discussed above are the incontrovertible proof that the Framers--and the American people--answered Hamilton's questions with a resounding "Yes."

Throughout the early history of our nation's armed services the use of the militia in wartime created a succession of problems. In the Mexican and Spanish American Wars the federal government encountered difficulty sending militia troops to Cuba, Puerto Rico, or the Philippines. To solve the problem, the government relied on militia regiments that divested themselves of their militia status by volunteering for service outside the United States; such volunteer regiments, "independent of state control, eventually made up the bulk of the increased forces. . . ."

After the Spanish American War, with the difficulties of raising troops were still fresh in the memory, the nation took steps "to transform a frontier police into a respected and modern fighting machine . . . a peace

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[10]*The Federalist Papers, supra*, No. 23 (at 156) (emphasis in original). *See also* No. 25 (at 162-163: To allow military readiness "to be provided for by the State governments, under the direction of the Union . . . would be in reality an inversion of the primary principle of our political association, as it would in practice transfer the care of the common defense from the federal head to the individual members: a project oppressive to some States, dangerous to all, and baneful to the Confederacy"--Hamilton).

establishment suited to the requirements of the United States as a world power." One aspect of this transformation involved the militia, which "was--one hesitates to say *re*organized--really organized." The need for such organization was enormous, for, as President Theodore Roosevelt told Congress in 1901, "Our militia law is obsolete and worthless." "Annual Message to Congress," Dec. 3, 1901, quoted in Wiener, *supra*, at 194, n. 71.

The result was the enactment, in 1903, of the Dick Act, 32 Stat. 775. It established an organized militia of the states, to be called the National Guard, "which should conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors." *Id.*

The next step in the creation of a modern National Guard was when, pursuant to its authority under the Army Clause, Congress enacted The National Defense Act of 1916, which "federalized" the National Guard, Act of June 3, 1916, 39 Stat. 166, and which has remained "the principal federal legislation affecting the militia, as organized into the National Guard." Kester, "State Governors and the Federal National Guard," 11 Harv. J.L. & Pub. Policy, 117, 187 n.6 (Winter 1988). Thereafter, every officer and enlisted member of the Guard was obliged to take a "dual oath" to support both his country and his state. The oath was needed in order to implement another portion of the Act, which provided for a draft whenever Congress should authorize the use of troops in excess of the regular forces. The effect of the draft was to discharge the Guard member from the state militia and thus render him available for

service abroad.[11] As one commentator has noted, "The Act rests on the principle that the right of the states to maintain a militia is always subordinate to the power of Congress 'to raise and support armies' . . ." Corwin, *The Constitution and What it Means Today* (14th rev. ed., 1978), at 118.[12] That principle is more than sufficient for this Court to uphold the constitutionality of the Montgomery Amendment. Congress clearly has the power to prevent the governors from vetoing training requirements of the U.S. National Guard.

Indeed, this Court has upheld this very principle. In *The Selective Draft Law Cases*, 245 U.S. 366 (1918), the Court rejected a claim that the Militia Clause limited Congress' power to draft under the Army

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[11]Under the Army Reorganization Act (June 4, 1920), 41 Stat. 759, the draft provision was amended so that Guardsmen did not have to be discharged from the militia after a draft into federal service.

[12]Federalization of the Guard was not limited to the dual oath and the draft. Indeed, "[t]he scope of federal control authorized by the 1916 Act completely transformed the Guard." Wiener, *supra*, at 200. The Guard was to receive "federal pay for armory drills and administrative work as well as for field encampments. . . . Not only were the states required to conform to the provisions of the law to obtain federal aid, but they were not permitted to maintain troops at all, except as Congress had provided or as the President might, under the authority delegated to him, thereafter direct. And the Guard from now on was not to consist merely of infantry and cavalry units fit only for parades or riot duty. It was to be organized so as to form complete higher tactical units. . . . The Constitutional provision, 'reserving to the States . . . the appointment of the officers,' was sharply curtailed by sections of the Act which prescribed the qualifications of National Guard officers, and made provision for their recognition by the federal authorities and for their elimination in case they should be found disqualified. No officer was eligible to receive federal pay unless he was federally recognized. The states might propose; the army would dispose." *Id.* at 200-201.

Clause. The "fallacy of the argument" made by the Petitioners in that case is precisely the fallacy of the argument made by Petitioners in this case, *i.e.*, the fallacy of "confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different." *Id.* at 382.

This Court noted that one of the primary reasons for replacing the Articles of Confederation with the Constitution had been to supply Congress's

> want of power . . . to raise an army. . . . In supplying the power it was manifestly intended to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. *Id.* at 381.

The Constitution vested Congress with the discretion as to whether, when, and to what degree it would exercise its power to raise armies; to the states was left "the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies." *Id.* at 382-3. That power "was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required. . . ." *Id.* at 383-4. *See also Cox v. Wood*, 247 U.S. 3 (1918).

By the National Guard Act of June 15, 1933, 48 Stat. 153, Congress--acting under the Army Clause--made the Guard a part of the Army at all times, as opposed to only during war or national emergency. Congress gave the Guard an entirely new status by

constituting it as a reserve component of the Army, to be known as the National Guard of the United States. The purpose of the Act was to avoid having to draft Guardsmen in order for them to enter federal service; they could now simply be *ordered* into federal service as units, and upon release from that service they would revert to their National Guard (state) status.[13]

As a result of the 1933 Act,

> the National Guard has today a dual status and every Guardsman is a reservist as well as a militiaman. . . . [T]he 1933 Act proved conclusively that a well-regulated militia is impossible of attainment under the militia clause, and can be organized only by resort to the plenary and untrammeled powers under the army clause. Weiner, *supra*, at 208-209.

This dual enlistment system is central to the very nature of today's Guard, and it has been upheld against constitutional challenge not only by the court below but also in the *Dukakis* case, *supra*, as well as in *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968) (rejecting claim that members of a state militia could be called forth by Congress only for the three purposes set

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[13]Under the 1933 Act, such an order could be given only if Congress declared a national emergency and authorized troops in excess of the regular army. However, in 1940, Congress enacted The Reserve Components Act (Act of August 27, 1940, 54 Stat. 858) authorizing the President to order the National Guard (and the Reserves) into federal service. Absent a statutory prohibition, the Guard--when in federal service pursuant to an "order"--could be used without territorial limitations, the same as the regular army. Army Regulations 130-10, ¶ 130 (March 27, 1940) (cited in Montgomery, "The Relation of the Militia Clause to the Constitutionality of Peacetime Compulsory Military Training," Va. L. Rev. 628 at 652-3, n.48 (1945)).

forth in clause 15) and *Johnson v. Powell*, 414 F.2d 1060, 1064 (5th Cir. 1969) (dual enlistment system "was a proper exercise of power necessary and proper to the raising and supporting of armies").[14]

The enormous differences between the militia of the eighteenth century and the modern, dual-status National Guard underscore the historical and constitutional problems with the Petitioners' claim that the Framers gave the governors the power to veto the training of the National Guard. That distinction makes it necessary that this Court recognize the power of Congress to authorize the training of the National Guard without interference from the 50 governors.

V. The Montgomery Amendment Is Necessary in Order to Insure that the United States Government Speaks With One Voice.

The Governor and State of Minnesota are not concerned about overseas training of the militia. They have no objection to such training and they recognize the utility of such training. What the Petitioners really object to is the foreign policy goals that were a byproduct of the training. That is clear from their implicit admission that overseas training is required. Petitioners state that the Framers "did intend the states, through

[14]In *Powell*, the Court ruled that Congress had properly "provided for a blending of the militia and the army," and that "nothing in the Constitution prohibits the National Guard from functioning in such a dual role." *Id.* at 1063-4. *Amici* note that, just as the army clause says nothing about *when* Congress may permissibly "raise and support armies," so it says nothing about *how* it shall do so. Furthermore, to the extent that the dual enlistment system enables Congress to maintain a smaller "standing army" than it would otherwise have to, that system accommodates the Framers' concerns in this area.

their control over the state militias, to serve as a check on the abuse of federal military power." Petitioners go on to conclude that "if the states' reserved authority for training indirectly in some way affects foreign policy, it is a permissible effect." The first claim is taking the founders' concerns out of context and the second demonstrates the danger of Petitioners' position. The Founders were concerned that a powerful standing army might run roughshod over the citizens of the states. That concern of the founders arose out of their understanding of the use of armies in Europe. That is not the concern of Governor Perpich. Governor Perpich's attempt to play a role in foreign policy by use of a veto of training would *not* protect the citizens of Minnesota from a domestic threat from the U.S. Army, instead, Gov. Perpich's veto of training would run roughshod over the rights and responsibilities of the Federal Government in the areas of National Defense and Foreign Affairs.

Amici Commonwealth of Massachusetts, *et al.* attempt to minimize the foreign policy concerns of the Federal Government by claiming that the governors of the states have not been able to affect the foreign policy objectives of the Federal Government in the 199 years prior to the passage of the Montgomery Amendment. Apparently, amici Commonwealth of Massachusetts et al. are unaware of the Commonwealth's nearly *successful* use of the Militia Clause to interfere with the foreign policy objectives of the United States in the War of 1812. In Senate Report No. 142, Senator Giles made a congressional report which laid out in detail ". . . the pretensions of the authorities of the States of Massachusetts, Connecticut, and Rhode Island, set up in opposition thereto [the rights and powers of the Government of the United States], if now acquiesced in, might be resumed by the State authorities in the event of a

future war, and thus deprive the Government of the United States of some of its most efficient legitimate means of prosecuting such a war with vigor and effect". S. Rep. No. 142, 13th Cong., 3d Sess. (1815).

Fortunately, the states have not been successful since then in interfering with the foreign policy and national defense of the United States. This Court should not now give the states that power.

The Constitution in Article II, Section 2 appoints the President as Commander in Chief of the Army, to which the National Guard of the United States belongs. Article II also assigns the President substantial authority in foreign affairs. The Constitution gives no such power to the states--indeed, it specifically withholds such power from them (see Article I, Section 10). Allowing state governors to interfere with a President's assigned roles in military and foreign affairs would strike at the heart of Presidential powers in military and foreign affairs.

The Montgomery Amendment, far from being unconstitutional, is a valid and appropriate legislative act that recognizes the President's authority in his constitutionally assigned role while also recognizing the state's interest in keeping the National Guard at home when domestic needs so require.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court uphold the Eighth Circuit's decision.

Respectfully submitted,

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